

24TH FEDERAL LITIGATION COURSE

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

I. INTRODUCTION.

- A. Types of Injunctive Relief.
 - 1. Temporary Restraining Order [TRO].
 - 2. Preliminary Injunction.
 - 3. Permanent Injunction.

II. TEMPORARY RESTRAINING ORDERS.

- A. General.
 - 1. Purpose: prevent irreparable injury to moving party until court can hear motion for preliminary injunction.
 - 2. Governing rules Fed. R. Civ. P. 65(b); RCFC 65(b).
- B. Procedure.
 - 1. Notice.
 - a. General rule: notice is required before entry of a TRO. E.g., Thompson v. Ramirez, 597 F. Supp. 726 (D.P.R. 1984).

--Notice to successful bidder. RCFC 65(f)(2).

b. Exception:

- (1) Movant will suffer irreparable injury if adverse party afforded opportunity to be heard; and
- (2) Movant's attorney certifies efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b); RCFC 65(b). *United States v. Jenkins*, 974 F.2d 32 (5th Cir. 1992).

c. Reality.

2. Term of the order: 10 days, with possible 10 day extension. Fed. R. Civ. P. 65(b); RCFC 65(b).
3. Security. Fed. R. Civ. P. 65(c); RCFC 65(c).
4. Moving for hearing for preliminary injunction -- takes precedence over other matters. Fed. R. Civ. P. 65(b); RCFC 65(b).
5. Burden of proof.
 - a. General. Burden of proof is on the moving party. *Crowther v. Seaborg*, 415 F.2d 437 (10th Cir. 1969); *Colorado Environmental Coalition v. Bureau of Land Management*, 932 F.Supp. 1247, 1251 (D. Colo. 1996) (citing *Seaborg*).
 - b. Elements. The standard four prong test for injunctive relief (*Trucke v. Erlemeier*, 657 F. Supp. 1382, 1389 (N.D. Iowa 1987) (citing *Younger v. Harris*, 401 U.S. 37 (1970))); *Minneapolis Urban League v. City of Minneapolis*, 650 F. Supp. 303 (D. Minn. 1986)):
 - (1) Substantial likelihood of success on the merits.
 - (2) Irreparable injury to movant if relief is denied.
 - (3) Relative harm to the opposing party (balance of harms).
 - (4) Impact on the public interest.

6. Appeal.
 - a. General rule: orders granting, denying, modifying, or dissolving TROs are not appealable. E.g., *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates*, 964 F.2d 599 (7th Cir. 1992); *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982).
 - b. Exceptions:
 - (1) Extension of TRO substantially beyond time limits of Rule 65(b). *Sampson v. Murray*, 415 U.S. 61 (1974); *United States v. Board of Education of City of Chicago*, 11 F.3d 668 (7th Cir. 1993).
 - (2) Grant or denial of the TRO effectively moots the case. *United States v. Washington Post Co.*, 446 F.2d 1322 (D.C. Cir. 1971).
 - (3) TRO issued following notice and hearing. *Religious Technology Center v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989).

III. PRELIMINARY INJUNCTIONS.

- A. General.
 1. Purpose: prevent irreparable injury during pendency of lawsuit.
 2. Governing rules: Fed. R. Civ. P. 65(a); RCFC 65(a).
- B. Procedure.
 1. Notice and hearing. Fed. R. Civ. P. 65(a)(1); RCFC 65(a)(1). *United States v. Board of Education of City of Chicago*, 11 F.3d 668 (7th Cir. 1993).
 - a. Type of hearing. See, e.g., *Drywall Tapers and Pointers of Greater New York v. Local 530 of Plasterers and Cement Masons International Association*, 954 F.2d 69 (2d Cir. 1992); *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986).

- b. Consolidation of trial on the merits. Fed. R. Civ. P. 65(a)(2); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 100-1 (2d Cir. 1985). Cf. *Berry v. Bean*, 796 F.2d 713, 719 (4th Cir. 1986) (consolidation of merits on appeal).
- 2. Security. Fed. R. Civ. P. 65(c); RCFC 65(c).
- 3. Appeal.
 - a. Orders granting, denying, modifying, or dissolving preliminary injunctions are appealable. 28 U.S.C. § 1292(a)(1).
 - b. Standard of appellate review: abuse of discretion. See, e.g., *McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519 (3d Cir. 1994); *King v. Innovation Books*, 976 F.2d 824, 828 (2d Cir. 1992); *Abbott Labs v. Mead Johnson Co.*, 971 F.2d 6, 12 (7th Cir. 1992); *Hale v. Department of Energy*, 806 F.2d 910, 914 (9th Cir. 1986).
 - c. Appellate forum. 28 U.S.C. §§ 1292(c); 1295(a)(2).

C. Burden of Proof

- 1. Burden is on the moving party. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S. 423 (1974).
- 2. Elements. See generally *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), rev'g, 747 F. Supp. 1160 (E.D.N.C. 1990); *Cunningham v. Adams*, 808 F.2d 815 (11th Cir. 1987); *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985).
 - a. Substantial likelihood of success on the merits. *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), rev'g, 747 F. Supp. 1160 (E.D.N.C. 1990); *Berry v. Bean*, 796 F.2d 713 (4th Cir. 1986); *Tremblay v. Marsh*, 750 F.2d 3 (1st Cir. 1985), rev'g, 584 F. Supp. 224 (D. Mass. 1984).

- b. Irreparable injury to the movant if relief is denied.
- (1) Discharge from government employment. *Sampson v. Murray*, 415 U.S. 61 (1974); *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), rev'd, 747 F. Supp. 1160 (E.D.N.C. 1990). Cf. *Martin v. Stone*, 759 F. Supp. 19 (D.D.C. 1991). But cf. *Tully v. Orr*, 608 F. Supp. 1222 (E.D.N.Y. 1985).
 - (2) Involuntary military service. *Patton v. Dole*, 806 F.2d 24 (2d Cir. 1986).
 - (3) Preserving a damages remedy. See, e.g., *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355-56 (10th Cir. 1986); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 52-53 (1st Cir. 1986).
 - (4) Alleged constitutional deprivations. *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion); *Covino v. Patrissi*, 967 F.2d 731 (2d Cir. 1992); *Mariani Giron v. Acevedo Ruiz*, 834 F.2d 238 (1st Cir. 1987).
 - (5) Loss of government contract; loss of ability to compete for contract. E.g., *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).
 - (a) Plaintiff can recover bid preparation costs. *Morgan Business Assoc. v. United States*, 619 F.2d 892 (Ct. Cl. 1980). Compare *Ainslie Corp. v. Middendorf*, 381 F. Supp. 305 (D. Mass. 1974), with *Cincinnati Electronics Corp. v. Kleppe*, 509 F.2d 1080 (6th Cir. 1975).
 - (b) Plaintiff cannot recover anticipated profits. *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). See *DLM & A, Inc. v. United States*, 6 Cl. Ct. 329 (1984).

- (c) Court generally will not order the award of a contract to a successful plaintiff. *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984); *Golden Eagle Refining Co. v. United States*, 4 Cl. Ct. 613 (1984). But cf. *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052 (1st Cir. 1987).
- c. Relative harm to the opposing party.
 - (1) Discharge from government service. *Pauls v. Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972).
 - (2) Bid protests. *Design Pak, Inc. v. Secretary of the Treasury*, 801 F.2d 525 (1st Cir. 1985); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).
 - (a) Expiration of bids. See *Sterlingwear of Boston, Inc. v. United States*, 11 Cl. Ct. 517 (1987).
 - (b) End of fiscal year.
 - (c) Impairment of government program.
 - (d) Interest in smooth, uninterrupted procurement process.
 - (e) Injury to third parties (successful bidder).
 - (f) Loss of money already expended on contract (post-award). See *Solon Automated Serv., Inc. v. United States*, 658 F. Supp. 28 (D.D.C. 1987).
- d. Impact on the public interest.

"But where an injunction is asked which will adversely affect a public interest, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the right of the parties, though the postponement may be burdensome to the plaintiff."

--*Yakus v. United States*, 321 U.S. 414, 441 (1944).
See also *Pruner v. Department of Army*, 755 F. Supp. 362 (D. Kan. 1991) (Injunctive relief pending military's processing of conscientious objector application "would seriously interfere with

the public interest in efficient deployment of troops in connection with Operation Desert Shield.").

But see, *Haitian Centers Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992). (the government may not assume that the public interest lies solely with it.)

3. Variations on the general rule:

- a. D.C. Circuit: "Under the well known standard set forth in this Circuit, four factors control the Court's discretion to grant a motion for a preliminary injunction: the likelihood that the plaintiff will prevail on the merits, the degree of irreparable injury that the plaintiff will suffer if the injunction is not issued, the harm to the defendant if the motion is granted, and the interest of the public. . . In the event that the last three factors favor the issuance of an injunction, a movant can satisfy the first factor by raising a serious question on the merits of the case."

--*Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

- b. 1st Circuit: "We recognize that a finding attributing great weight to one of the four components may make up for a relatively weak finding as to another. If the chances of success are good, but not the highest, and the adverse effect on the public interest very serious should the prognostication prove mistaken, the public interest might require that the injunction be denied."

--*Mariani Giron v. Acevedo Ruiz*, 834 F.2d 238, 240 (1st Cir. 1987).

- c. 2d Circuit: "The standard in this Circuit for the issuance of a preliminary injunction requires the moving party to establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious ground for litigation and a balance of the hardships tipping decidedly in its favor."

--*Britt v. United States Army Corps of Eng'rs*, 769 F.2d 84 (2d Cir. 1985).

- d. 3d Circuit: Plaintiff must show both likelihood of success on the merits and probability of irreparable harm, and the district court

should consider the effect of issuance of injunction on other interested persons and the public interest.

--Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86 (3d Cir. 1992).

- e. 4th Circuit: "On a motion for a preliminary injunction, the district court is first to balance the likelihood of harm to the plaintiff if the temporary injunction is not issued against the likelihood of harm to the defendant if the injunction is issued. If the harm to the plaintiff greatly outweighs the harm to the defendant, then enough of a showing has been made to permit the issuance of an injunction, and the plaintiff need not show a likelihood of success on the merits, for a grave or serious question is sufficient. But as the harm to the plaintiff decreases, when balanced against harm to the defendant, the likelihood of success on the merits becomes important."

--Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985); Blackwelder Furniture Co. v. Selig Mfg. Co., 550 F.2d 189 (4th Cir. 1977); see also, Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

- f. 5th Circuit: The four prerequisites for the relief of a preliminary injunction are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) the threatened injury to plaintiff must outweigh the threatened harm the injunction may do to defendant, and (4) granting the preliminary injunction will not disserve the public interest.

--Wiggins v. Secretary of the Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991).

- g. 6th Circuit: Where factors other than likelihood of success on the merits all are strongly in favor of a preliminary injunction, an injunction may be issued if the merits present a sufficiently serious question to justify further investigation.

--In re Delorean Motor Co., 755 F.2d 1223, 1230 (6th Cir. 1985).

- h. 7th Circuit: " $P \times H > (1 - P) \times H$."

[A district court may grant a preliminary injunction "only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error."]

--American Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589 (7th Cir. 1985). See also Schultz v. Frisby, 807 F.2d 1339, 1343 (7th Cir. 1986), aff'd on rehearing, 822 F.2d 642 (7th Cir. 1987) (en banc); Roland Mach. Co. v. Dresser Ind., Inc., 749 F.2d 380, 386-88 (7th Cir. 1984).

- i. 8th Circuit: "[T]he essential inquiry in weighing the propriety of issuing a preliminary injunction is whether the balance of other factors tips decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for more deliberate investigation."

--General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 624-25 (8th Cir.1987).

- j. 9th Circuit: "To succeed on a motion for a preliminary injunction the movant must show 'either (1) a combination of probable success on the merits and a possibility of irreparable injury or (2) that serious questions are raised and the balance of the hardships tips sharply in the moving party's favor.'"

--Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986), quoting Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). But cf. Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985) (Sampson v. Murray controls in public employment cases).

- k. 10th Circuit: "Where the movant for a preliminary injunction prevails on the factors other than likelihood of success on the merits, it is ordinarily sufficient that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."

--City of Chanute v. Kansas Gas & Electric Co., 754 F.2d 310, 314 (10th Cir. 1985); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

1. 11th Circuit: To obtain a preliminary injunction, the plaintiff must prove: (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that the injury to the moving party from denial of injunctive relief outweighs the damage to the other party if it is granted; and (4) that the injunction will not harm the public interest.

--GSW, Inc. v. Long County, Georgia, 999 F.2d 1508 (11th Cir. 1993).

- m. Fed. Circuit: In determining whether to issue a preliminary injunction, there are four relevant factors: (1) degree of immediate irreparable harm to the plaintiff; (2) degree of harm to the party to be enjoined; (3) the impact of the injunction on public policy considerations, and (4) the likelihood of plaintiff's ultimate success on the merits. These competing elements must be simultaneously weighed.

--We Care, Inc. v. Ultra-Mark, International Corp. 930 F.2d 1567 (Fed. Cir. 1991).

IV. PREPARING THE GOVERNMENT'S RESPONSE.

- A. Gathering Facts, Documents, and Experts.
- B. Strategy -- Government's Options.
- C. Defenses.
 1. Facts.
 2. Legal issues.

V. CONCLUSION.